

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 26, 2017**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP2497**

**Cir. Ct. No. 2013CV3017**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**LEAH JOHNSON AND MITCH,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**CITY OF MADISON ZONING BOARD OF APPEALS,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Dane County:  
JOHN C. ALBERT, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. Leah Johnson and Mitch (collectively, “Johnson”) appeal a decision by the City of Madison Zoning Board of Appeals, which denied Johnson’s request for a setback variance. Johnson owns a reverse-corner lot in the Greenbush Neighborhood of Madison, which is a TR-C3 zoning district. Johnson

wishes to replace the 246-square-foot detached garage currently on her lot with a 660-square-foot garage.

¶2 Madison’s zoning regulations require a ten-foot setback for garages on reverse-corner lots in TR-C3 districts. Johnson requested a setback variance to build the proposed garage five feet into the setback area. The Board heard and rejected Johnson’s variance request. Johnson appealed to the circuit court, which sustained the Board’s decision. Johnson appeals.

### STANDARD OF REVIEW

¶3 Property owners may challenge a zoning board’s denial of an application for a variance by commencing a certiorari action in circuit court. *See* WIS. STAT. § 59.694(10) (2015-16).<sup>1</sup> When the circuit court’s decision is appealed to this court, we review the zoning board’s decision, not the circuit court’s decision. *Driehaus v. Walworth Cnty.*, 2009 WI App 63, ¶13, 317 Wis. 2d 734, 767 N.W.2d 343. Because the legislature delegated zoning issues to local zoning boards, we “must accord a presumption of correctness and validity” to the Board’s decision and “may not substitute” the Board’s discretion with our own. *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adjustment*, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401.

¶4 When, as in this case, no additional evidence is taken in the circuit court, certiorari review is limited to: (1) whether the Board exceeded its jurisdiction; (2) whether the Board acted on the correct theory of law; (3) whether

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

the Board's decision was arbitrary, oppressive, or unreasonable and if it represented the Board's will instead of its judgment; and (4) whether the Board could reasonably make its decision based on the evidence before it. *Id.*, ¶14. The property owner has the burden to prove that the zoning board was obligated to grant the request variance. *See id.*, ¶7.

## DISCUSSION

¶5 WISCONSIN STAT. § 62.23(7)(e)7. authorizes the Board to grant variances from zoning restrictions that are not “contrary to the public interest, where, owing to special conditions, a literal enforcement ... will result in practical difficulty or unnecessary hardship....” The purpose of a variance is to ensure that injustice is not caused by applying zoning restrictions so harshly that it creates difficulty and hardship for property owners. *See Ziervogel*, 269 Wis. 2d 549, ¶25. As discussed in *Ziervogel*, there are two types of variances, use and area, and they have different purposes and are treated differently by zoning boards. *Id.*, ¶22. There is no dispute that Johnson requests an area variance. Area zoning regulates “density, setbacks, frontage, height, and other dimensional attributes.” *Id.* The purpose of area zoning restrictions is to create uniform development and lot and structure sizes within a neighborhood. *Id.* Area variances enable property owners to build or modify structures for permitted uses that would otherwise be barred by pertinent zoning ordinances. *Id.*, ¶21.

¶6 Before moving into our four-prong analysis, we pause to note an important concession made by Johnson in her appellate brief. Johnson admits that she could build a differently configured 660-square-foot garage within the setback. She wants the setback variance to save money, preserve yard space, and have her

preferred garage shape. With that concession noted, we begin the four-prong analysis.

*A. The Board kept within its jurisdiction*

¶7 The first issue is whether the Board kept within its jurisdiction. The Board has jurisdiction “t[o] hear and act upon applications for variances from the terms provided” by ordinance. M.G.O. § 28.205(3)(b). The Board may “approve, conditionally approve, or deny a variance after a public hearing.” M.G.O. § 28.184(4)(b). However, the Board “shall not grant” an area variance unless it finds that the following pertinent conditions are present:

1. There are conditions unique to the property of the applicant that do not apply generally to other properties in the district.

2. The variance is not contrary to the spirit, purpose, and intent of the regulations in the zoning district and is not contrary to the public interest.

....

4. For an area variance, compliance with the strict letter of the ordinance would unreasonably prevent use of the property for a permitted purpose or would render compliance with the ordinance unnecessarily burdensome.

5. The alleged difficulty or hardship is created by the terms of the ordinance rather than by a person who has a present interest in the property.

6. The proposed variance shall not create substantial detriment to adjacent property.

7. The proposed variance shall be compatible with the character of the immediate neighborhood.

M.G.O. § 28.184(5)(a).

¶8 Johnson argues that the Board exceeded its jurisdiction by considering the size of the proposed garage, which exceeds zoning limits.

According to Johnson, this is an issue for the City Plan Commission, not the Board. In support of this argument, Johnson points to a comment made by a Board member during the proceedings that the proposed garage is larger than the maximum size allowed in Johnson's zoning district without a conditional use permit.

¶9 The Board argues that it based its decision on the proper criteria and acted within its jurisdiction. We agree.

¶10 The Board did not decide whether Johnson could build an oversized garage, which is the planning commission's domain, but whether Johnson could build her proposed garage five feet into the setback. It is apparent that the Board understood that a decision on whether to allow an oversize garage was a decision for a different city entity. During the public meeting, the zoning administrator reminded the Board that any variance from size limitations was for the planning commission to decide.

¶11 As we understand Johnson's argument, she believes it is improper for the Board to even *consider* the size of a structure when deciding whether an area variance is warranted. However, area variance decisions cannot be decided in a vacuum, and here, it was appropriate to consider size when deciding whether to grant a setback variance. See *Driehaus*, 317 Wis.2d 734, ¶¶16-17 (although "use" was not an issue for the board to decide, use was a proper consideration in deciding whether to grant an area variance). In other words, a zoning board may consider similar factors as those considered by related agencies without usurping the role of the related agencies, so long as the ultimate ruling is within its domain. *Id.*, ¶18.

¶12 In this case, the size of the proposed garage was a permissible consideration. In particular, the Board had to contemplate the proposed size of the garage to determine its impact on the neighborhood and whether compliance with the setback restriction would be unnecessarily burdensome for Johnson. Accordingly, one Board member appropriately said during the hearing that enforcing the setback restriction would not create an unnecessary burden because a “well-functioning garage can be built without requiring a variance.” That is, the Board member expressed the view that Johnson did not need a setback variance to build a larger, well-functioning garage. This supports the Board’s view that the burden would be small because Johnson had other options to build the larger garage that she desired.

¶13 Notably, Johnson does not disagree. Johnson did not argue that denial of the variance prevented her from building a similarly sized garage. Regardless, the Board examined the evidence related to the six pertinent conditions prescribed by ordinance before voting. We conclude that the Board did not act outside the scope of its legal authority by considering the size of the proposed garage.

*B. The Board proceeded on the correct theory of law*

¶14 The next issue is whether the Board proceeded on a correct theory of law. When considering whether to grant an area variance, the Board must determine if doing so is necessary because the existing zoning regulation creates an unnecessary hardship for the property owners who request the variance. WIS. STAT. §62.23(7)(e)7. As stated above, an area zoning regulation creates an unnecessary hardship if it unreasonably prevents a permitted purpose or is unnecessarily burdensome. *Ziervogel*, 269 Wis. 2d 549, ¶7. The hardship must be

based on the property's unique conditions and not the property owner's personal concern or due to a problem created by the property owner. *Id.*, ¶20.

¶15 When determining whether a variance is warranted, a zoning board must conduct a balancing test that considers the purpose of the pertinent zoning restriction, the effect of the restriction on the property, and the effect that a variance would have on the neighborhood and larger public interest. *See id.*, ¶7.

¶16 In other words, the Board

must determine whether a hardship unique to the property has been demonstrated and whether the relief requested is consistent with the public interest such that the variance should be granted, or whether a variance would subvert the purpose of the zoning restriction to such an extent that it must be denied.

*Id.*, ¶34. A zoning board is required to “apply the appropriate legal standards and adequately express the reasons for its decision on the record.” *Driehaus*, 317 Wis. 2d 734, ¶13.

¶17 Johnson argues that the Board improperly used the “no reasonable use” test, which is used for use variances, rather than the “unnecessary hardship” test, which is used for area variances. *See Ziervogel*, 269 Wis. 2d 549, ¶¶30-31 (assigning different standards to establish unnecessary hardship for area variance and use variance cases). As best we can discern, Johnson makes the following supporting arguments.

¶18 As to the purpose of the zoning restriction, Johnson summarizes the goals of the zoning plan as promoting traditional neighborhoods, ensuring that additions are designed with sensitivity to their context, maintaining the viability of existing housing, and facilitating goals of neighborhood plans. Simply stated,

Johnson argues that the proposed garage would reinforce the goals of her district's zoning restrictions, because the proposed garage will replace a dilapidated garage with a new garage designed to fulfill the neighborhood goals.

¶19 Johnson claims that the setback restriction has a negative impact on her property because without a variance, the garage will either be smaller or cause Johnson to “lose valuable green space.” Johnson writes: “almost *any* negative effect would constitute an unnecessary burden because the requested variance actually furthers, rather than thwarts, the purposes of the zoning code.” Johnson also claims to have a unique property because the driveway is too short to park a car, the lot is the smallest in the neighborhood without alley access, and it is a reverse-corner lot. In aggregate, Johnson says these considerations make the lot unique, mainly because if not for those features of the property, the setback would be either two feet or four feet instead of ten feet.

¶20 Alternatively, Johnson argues that the Board's consideration of the impact of the proposed variance on the neighborhood is faulty. According to Johnson, the Board improperly focused on how the “oversized” garage would affect the “view corridor” of neighboring houses. Johnson argues that the Board invented the term “view corridor” and “view corridor” is not a proper consideration. Johnson also argues that the proposed garage would reduce the number of parked cars on crowded streets.

¶21 Johnson's arguments all miss the mark. Johnson does not point to any place in the record demonstrating that the Board applied the wrong test. As to Johnson's individual arguments, they all address considerations that are appropriate under the “unnecessary hardship” test used for area variances.



¶22 The Board decided that the setback rule was not unduly burdensome because it did not unreasonably prevent Johnson from using her property for a permitted purpose. The Board pointed out that there was no evidence that building the proposed garage within the setback would cost more or that Johnson would incur an unnecessary burden if forced to use “additional green space for [her] garage.”

¶23 The Board determined that the proposed garage would be closer to the street than the neighboring house and impact views from the neighboring house. Johnson completely fails to support the notion that open space and the views provided by more open space is somehow unrelated to the benefits obtained by enforcing setback requirements. Notably, the record shows that a larger garage in the neighborhood, cited by Johnson, was built within that property’s setback requirements.

¶24 Johnson fails to support her assertion that the Board improperly considered the uniqueness of her lot. She makes no persuasive argument undercutting the Board’s findings that reverse-corner lots are common and that Johnson’s property does not present any specific issues that would make it sufficiently unique to warrant a variance.

¶25 As to Johnson’s assertion that granting the variance, and thus allowing the proposed garage, would keep parked cars off crowded streets, the record shows otherwise. Johnson already parks both of her household cars off-street. Without a variance, she could build a larger garage and still park two cars off-street.

¶26 The Board’s decision was based on the three-part hardship test from *Ziervogel*, which is codified at M.G.O. § 28.184(5)(a). The Board is required to

consider the impact of the variance on Johnson and the neighborhood within the context of the zoning restriction. It determined that the purpose of the ten-foot setback was to have clear space between Johnson's garage and the neighboring house, and that the impact on Johnson's property would be minimal because a suitable garage could be built without the variance. In sum, the Board determined that the variance request was based on personal desire rather than hardship, and that Johnson wanted to "impose on the street, but ... not ... impose on [her] own backyard." Based on our review of the Board's overall analysis, we conclude that it considered the correct theory of law when making its decision.

*C. The Board's decision was not arbitrary, oppressive, or unreasonable and did not represent its will but rather its judgment*

¶27 The next query is whether the Board's decision was arbitrary, oppressive, or unreasonable and represented its will and not its judgment. Johnson claims the facts of this case are similar to a case in which the Wisconsin Supreme Court found that a zoning board's decision was arbitrary because it relied on a conclusory recitation of the appropriate standards of law and failed to explain its reasoning as related to the specific variance request. ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals of Milwaukee***, 2005 WI 117, ¶27, 284 Wis. 2d 1, 700 N.W.2d 87. A zoning board is required to state the statutory criteria used to consider the application for a variance and the reasons or grounds for "why the Board decided that the facts did not fit the statutory criteria." ***Id.***, ¶27.

¶28 As previously discussed, the pertinent legal criteria for Johnson's variance request is provided by M.G.O. § 28.184(5)(a). As should be apparent by now, we conclude that during the hearing, the Board appropriately discussed the relevant conditions listed in the ordinance and assessed whether Johnson's

variance request fit or did not fit each condition. The Board's decision was not arbitrary, oppressive, or unreasonable.

*D. The Board's decision was reasonably based on the evidence*

¶29 The fourth and final query is whether the Board might reasonably make the order or determination in question based on the evidence. Courts will not disturb the Board's decision if any reasonable view of the evidence sustains it. *State v. Outagamie Cnty. Bd. of Adjustment*, 2001 WI 78, ¶26, 244 Wis. 2d 613, 628 N.W.2d 376.

¶30 Johnson argues that the Board reached two conclusions contrary to the evidence: one, that the property is not unique, and two, that the garage would be detrimental to neighbors, despite the support of the neighborhood. We have already explained that the Board properly determined that the property is not unique within the meaning of the undue hardship test. Johnson's property is a reverse-corner lot, which, as we stated, is common in Madison, and the Board reasonably determined that Johnson's particular reverse-corner lot did not present sufficiently unusual topographical issues to warrant granting the variance request.

¶31 Johnson points out that at least some of her current neighbors do not oppose a variance. However, the Board correctly points out that, although it may consider what neighbors say about a proposed variance, those opinions are not determinative. *See Driehaus*, 317 Wis.2d 734, ¶¶21-27. In fact, Johnson mistakes the role of the Board, which is to consider the impact on the *neighborhood as a whole*, not the impact on the applicant's *neighbors specifically*. Of course, neighborhoods outlast the residencies of the people who currently live in them. The determination of whether to grant a zoning variance is not a popularity contest. Johnson's neighbors may be supportive, or they may be

unwilling to publicly oppose Johnson's variance request. Regardless, allowing the proposed garage to be built within the setback will have a permanent impact on the neighborhood and all future neighbors.

¶32 Johnson has failed to demonstrate that the Board's decision is not reasonably supported by the evidence.

### CONCLUSION

¶33 For the above reasons, we affirm the circuit court's affirming of the Board's decision denying Johnson's request for a zoning variance.

*By the Court.*—Order affirmed.

This appeal will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

